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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

LOUIS J. BAKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 18 U.S.C. § 1955 and § 1952 properly apply to the activity of LOUIS BAKER as an employee of Indian owners of a business venture conducted on Indian tribal trust land?

2. Whether in the pending case, the United States District Court had jurisdiction of the parties and the subject matter of a gambling activity on Indian tribal trust land?

3. Whether or not the State of Washington has criminal jurisdiction over the Indian trust land properly upon which the subject gambling activities were conducted?

4. Whether or not the subject gambling activities were conducted in violation of the law of the State of Washington?

5. Whether the Court improperly refused Defendant's requested jury instructions Number 8 and 14, which set forth the central issues of defense of Appellant, LOUIS BAKER?

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. THE STATE OF WASHINGTON DID NOT HAVE JURISDICTION TO PROHIBIT GAMBLING ACTIVITIES ON TRIBAL TRUST LAND 4

II. TITLE 18 U.S.C. §1955 AND §1952 DO NOT APPLY TO THE ACTIVITIES OF LOUIS BAKER AS AN EMPLOYEE OF INDIAN OWNERS OF A BUSINESS VENTURE CONDUCTED ON INDIAN TRIBAL TRUST LAND 6

III. THE COURT IMPROPERLY REFUSED THE DEFENDANT'S REQUESTED JURY INSTRUCTIONS WHICH SET FORTH THE ESSENTIAL ISSUE OF THE DEFENSE OF MR. BAKER 8

CONCLUSION 9

CERTIFICATE OF SERVICE 10

APPENDIX A 1a

APPENDIX B 1b

APPENDIX C 1c

TABLE OF AUTHORITIES

Page

Cases:

Arquette v. Schneckloth,
56 W.N. 2d 178, 351 P.2d 921 (1960) 5

McClanahan v. Arizona State Tax Commission,
411 U.S. 164 (1972) 7

Monroe
55 W.N. 2d 107, 346 P.2d 667 (1959) 5

Roberts v. Schneckloth,
55 W.N. 2d 105, 346 P.2d 668 (1959) 5

United States v. Chiarizo,
525 F.2d 289 (2nd Cir., 1975) 7

United States v. Gordon,
464 F.2d 357 (9th Cir., 1972) 7

Wesley v. Schneckloth,
55 W.N. 2d 90, 346 P.2d 658 (1959) 5

Constitution, Statutes and Rules:

18 U.S.C. §1152 6

18 U.S.C. §1153 5

15 U.S.C. §1175 2

28 U.S.C. §1254(1) 1

10 Stat. 1132, 1854 2

18 U.S.C. 1952 2,4,5,7

280 (83rd Congress, 1st Session) 1953 3

18 U.S.C. 1955 2,3,4,5,7

(RCW Chapter 9.46) 5

(RCW 9.46.030) 5

37.12.021 Revised Code of Washington 3

Other Authorities:

Clinton Jurisdiction Over Indian Lands, A Journey Through a Jurisdictional Maze
18 Arizona Law Review, 503 6

The Petitioner, LOUIS J. BAKER, respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on or about June 16, 1980 and the Order of August 14, 1980 denying the Petition for Rehearing and rejecting the Suggestion for a Rehearing En Banc.

OPINION BELOW

The Order of the United States Court of Appeals for the Ninth Circuit was filed on or about June 11, 1980 in a reported Opinion. A copy of the Opinion is attached hereto as Appendix A. On or about August 14, 1980, the United States Court of Appeals for the Ninth Circuit additionally denied Petitioner's Motion for Rehearing and rejected Petitioner's Suggestion for a Rehearing En Banc and in part amended the Opinion of June 11, 1980. A copy of said Order of August 14, 1980 is attached hereto as Appendix B.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioner respectfully suggests that three Federal Statutes, being Title 18 U.S.C. §1952 and §1955 and Title 15 U.S.C. §1175 are relevant as are numerous provisions of the State of Washington statutory enactments. A copy of said Statutes is attached hereto as Appendix C.

STATEMENT OF THE CASE

Petitioner was sentenced to six (6) months confinement and fined TEN THOUSAND ($10,000.00) DOLLARS for a violation of Title 18 U.S.C. §1955 (Conducting an Illegal Gambling Business) and 18 U.S.C. §1952 (Interstate Travel in Aid of a Gambling Enterprise) to be served concurrently following a jury trial in the United States District Court for the Western District of Washington. Petitioner, a non-Indian, was employed as a floor manager and casino manager of a business known as The Indian House owned by a member of the Puyallup Indian Tribe. The business was conducted at a site within the Puyallup Indian Trust Lands located within the boundary of the State of Washington. The gaming activity involved in the case-at-bar, was conducted upon a business establishment owned by enrolled members of the Puyallup Indian Tribe. The Puyallup Indian Tribe of which Petitioner's employer was a member claimed certain territorial and soverign rights by the Treaty of Medicine Creek granted by the United States in 1854 (10 Stat. 1132). The Statutes of the State of Washington did provide for licensing and regulating of gambling activities and in certain instances

prohibited gambling activities. It was contended below, however, that the general statutes of the State of Washington of a criminal nature do not extend to indians or at least to indians whose activities are within indian lands or as they apply to Petitioner, an employee of an indian. Petitioner although a non-indian was an employee of the business that was owned and managed by persons who were enrolled members of the Puyallup Indian Tribe. Title 18 U.S.C. §1955 provides that a prohibited activity is an illegal gambling business which "[i] is a violation of the law of a state or political subdivision in which it is conducted." The indictment upon which Petitioner was tried alleged that the activity of the Indian House was a violation of the Statutes of the State of Washington's licensing and regulating gambling activities. At the time that the State of Washington was admitted to the Union, the State of Washington adopted within its Constitution, a disclaimer of jurisdiction to lands lying within the limits of indian tribes (Article XXVI of the Washington State Constitution). In 1957 and again in 1963, the State of Washington sought to assume partial jurisdiction over indians and indian territories pursuant to the consent of the United States granted by Congress in 1953 in public law 280 (83rd Congress, 1st Session). This assumption of jurisdiction by the State of Washington, however, was partial and pertained to matters of welfare and domestic relations rather than to criminal and commercial activities (37.12.010 of Revised Code of Washington). Although a companion statute provided for the State of Washington to assume full civil and criminal jurisdiction of indian people and indian lands if so requested by the governing body of the indian tribe (37.12.021 of Revised Code of Washington), the Puyallup Indian Tribe had never requested the State of

Washinton to assume full civil or criminal jurisdiction. It is therefore consequently asserted that the Petitioner could not be convicted of a violation of Title 18 U.S.C. §1955 or §1952 if the gambling activity of his employer was not unlawful. Additionally, at the time of trial, the Petitioner asserted that the Trial Court denied his requested instructions to the jury that pertained to the central issues of his defense. The consensus of the opinions of the United States Court of Appeals for the Ninth Circuit affirmed the convictions of the Petitioiner and the co-defense denying these reasons for vacating his conviction and denying the Petitioner a re-hearing.

REASONS FOR GRANTING THE WRIT

I.

THE STATE OF WASHINGTON DID NOT HAVE JURISDICTION TO PROHIBIT GAMBLING ACTIVITIES ON TRIBAL TRUST LAND.

The essential question which arises is whether Title 18 U.S.C. §1952(2)(b) and 18 U.S.C. §1955(a)(b) prohibits gambling activities on indian lands of the Puyallup Tribe. By the Treaty of Medicine Creek (10 Stat. 1132), the Puyallup Indian Tribe acceded certain lands to the United States but expressly reserved certain lands to themselves, a small portion of which comprised the location of the business activity upon which Mr. BAKER was employed. To certain Washington statutory enactments, the State of Washington attempted to assume partial jurisdiction over Indians and

indian territory pursuant to the consent of the United States granted by Congress. The Government's theory in the prosecution of Mr. BAKER contemplated that the business of the Indian House which was the gaming establishment constituted an unlawful activity under the laws of the State of Washington. Title 18 U.S.C. §1955 contemplates that participation in a gambling business is unlawful only if it is a violation of the laws of the state in which it is conducted and Title 18 U.S.C. §1952 prohibits the travel in interstate commerce to promote or facilitate the promotion of an activity which is unlawful in the state in which the activity is conducted. Since both Federal Statutes refer to the definition of an act prohibited by a State Statute, those statutes which were enacted in the State of Washington are relevant to the case-at-bar. The Washington Statutes assert in part the regulation of gambling activities (RCW Chapter 9.46). Through Washington law, a gambling commission has been established and certain activities of gambling are permitted (RCW 9.46.030). There are also certain criminal violations which the State of Washington enacted; although there are no reported decisions involving state enforcement of Washington laws pertaining to gambling on tribal trust lands.

In numerous decisions in 1959, the Washington Supreme Court held that its courts did not have jurisdiction of an indian charged with a crime identified with 18 U.S.C. §1153, being the Major Crimes Act committed within Indian country. *In re Wesley vs. Schneckloth,* 55 W.N.2d 90, 346 P.2d 658 (1959); *In re Roberts vs. Schneckloth,* 55 W.N.2d 105, 346 P.2d 668 (1959) and *In re Monroe,* 55 W.N.2d 107, 346 P.2d 667 (1959). In the case of *In re Arquette v. Schneckloth,* 56 W.N.2d 178, 351 P.2d 921 (1960), the Washington Supreme Court held that the State Courts did not have jurisdiction over an indian who was

alleged to have committed a crime upon an Indian Reservation under 18 U.S.C. §1152. In that Opinion, the State Court recognized that the State Courts because of Washington Statutes did not have jurisdiction over all civil and criminal matters which occurred in regard to Indians on Indian Reservations. It is therefore suggested that the State of Washington did not purport to assert criminal jurisdiction through Chapter 9.46 upon enrolled Indians on tribal trust land and therefore that the conviction of Mr. BAKER was erroneous and must be reversed.

II.

TITLE 18 U.S.C. § 1955 AND § 1952 DO NOT APPLY TO THE ACTIVITIES OF LOUIS BAKER AS AN EMPLOYEE OF INDIAN OWNERS OF A BUSINESS VENTURE CONDUCTED ON INDIAN TRIBAL TRUST LANDS.

As a general rule, Federal Criminal jurisdiction over Indian lands is governed by three types of statutes; the first being Statutes creating Federal crimes which are applicable to the Nation as a whole and also applicable to Indian lands. The second are those Statutes which proscribe specified conduct occurring on Indian lands and create a Federal crime with one of the material elements being the occurrence of the crime on Indian land. The third type of criminal statute effecting Indian lands specifically purports to structure the jurisdictional pattern for prosecution on certain crimes occurring thereon. See Clinton, *Criminal Jurisdiction Over Indian Lands, a Journey through a Jurisdictional Maze,* 18 Arizona Law Review, 503.

Both 18 U.S.C. §1952 and §1955 require an essential element that the activity of the defendant involve a gambling business which is in violation of the laws of the state in which it is conducted. If there is no violation of State gambling laws, there is no violation of either Statute. *United States v. Chiarizio,* 525 F.2d 289 (2nd Cir., 1975), *United Sates v. Gordon,* 464 F.2d 357 (9th Cir., 1972). Again in the case-at-bar, the gambling activities at the Indian House could not violate the prohibitions of Washington laws because the State of Washington has not purported to assert jurisdiction of its criminal laws in this area. The activities of Mr. BAKER become subject to the statutes criminal sanctions only if the activities are unlawful at the site where they are carried on. To sustain the conviction of Mr. BAKER under the indictment would subject the Indian tribes to the jurisdiction of State laws in excess of that which Congress has authorized. An extension of Title 18 U.S.C. §1955 to encompass a prosecution for violating various taxing, licensing or regulatory provisions of the Washington Statutes would seemingly be in conflict with the case of *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1972). It should additionally be noted that in the case-at-bar while Mr. BAKER is not an Indian, he was an employee of Indians acting on Indian land.

III.

THE COURT IMPROPERLY REFUSED THE DEFENDANT'S REQUESTED JURY INSTRUCTIONS WHICH SET FORTH THE ESSENTIAL ISSUE OF THE DEFENSE OF MR. BAKER.

Evidence was adduced at the time of trial that prior to the commencement of employment at the Indian House, Mr. BAKER was of the belief that gambling activities of the Indian House and other establishments similarly located were legal under Washington State law because they were conducted on Indian trust lands which were excluded from jurisdiction of Washington State law. Although there was a conflict in the testimony, Mr. BAKER indicated that he had been advised by one FRED HAGGARD, a member of the State of Washington Gambling Commission that Washington Gambling laws did not apply to Indian land. FRED HAGGARD testified that the subject of gambling on Indian land was discussed with Mr. BAKER and it was indicated that the question of whether the State of Washington Gambling laws apply to Indians land was a clouded question and was not one which was clear-cut. There was no dispute at the time of trial that the dominant business purpose of the Indian House was gambling and that Mr. BAKER was an employee of that establishment. Mr. BAKER was, however, an employee of an enrolled member of the Puyallup Indian Tribe and was acting on tribal trust lands within the Puyallup Indian Reservation. At the time of trial, the Defendant proposed two jury instructions as follows:

> "Defendant's Proposed Instruction No. 8: Under Count II of the indictment, the Government must prove beyond a reasonable doubt that the Defendant knew

the business enterprise involving gambling violated State law."

"Defendant's Proposed Instruction No. 14: You are instructed that the gambling laws of the State of Washington do not apply to Indians when on allotted lands within an established Indian Reservation and held in trust by the United States."

Both jury instructions were rejected by the Trial Court, and it is suggested that the refusal to give said instructions is error.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was mailed this _____ day of October, 1980, postage prepaid, to the Honorable WADE McCREE, JR., Solicitor General, United States Department of Justice, Washington, D.C. 20530.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HAROLD FARRIS, Plaintiff-Appellee,	)	No. 78-3517 DC CR 78-40-1
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JODY SATIACUM, Defendant-Appellant.	)	No. 78-3567 DC CR 78-52-1
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ALLEN DUDLEY POWELL, Defendant-Appellant.	)	No. 79-1013 DC CR 78-35
UNITED STATES OF AMERICA, Plaintiff-Appellee, v.	)	No. 79-1015 DC CR 78-40-3

LOUIS J. BAKER, Defendant-Appellant.	)	
UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 79-1313 DC CR 78-76T-1/2/3
RAY TURNIPSEED,BERTHA TURNIPSEED, and MACKENZIE TURNIPSEED, Defendants-Appellants.	)	
UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 79-1337 DC CR 78-76-4
DAVID PAINTER, Defendant-Appellant.	)	
UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 79-1338 DC CR 78-76-5 OPINION
MELVYN LOCKWOOD, Defendant-Appellant.	)	

Appeal from the United States District Court
for the Western District of Washington

Before: BROWNING, CHOY and KENNEDY, Circuit Judges.

CHOY, Circuit Judge:

Appellants attack their conviction under 18 U.S.C. §1955 on the ground that their large-scale gambling businesses on Indian trust land did not violate state law, and on other grounds. We affirm.

I. Background: The Law

Enacted as part of the Organized Crime Control Act of 1970, 18 U.S.C. §1955 reads in pertinent part:

> (a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section—
>
> (1) "illegal gambling business" means a gambling business which—
>
> (i) *is a violation of the law of a State* or political subdivision *in which it is conducted;*
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.
>
> (Emphasis added.)

We held in *United States v. Sacco,* 491 F.2d 995 (9th Cir. 1974) (en banc), that §1955 "was aimed at curtailing syndicated gambling, the lifeline of organized crime, which

provides billions of dollars each year to oil its diversified machinery." *Id.* at 998. "Congress determined that organized crime posed a major threat to American society and that illegal gambling operations provided organized crime with its greatest source of revenue." *Id.* at 999.

Judge Browning correctly says that § 1955 was designed to aid the enforcement of state law, especially where state enforcement is disabled by the corruption of state officials, but the statute also serves to further independent federal interests. Congress found that "illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof," *id.* at 999; moreover, "[t]he illicit operations were seen to distort the production of goods for commerce and the flow of goods in interstate commerce," *id.* at 1000.

Section 1955 is constitutional, even as applied to cases with no connection with interstate commerce or organized crime. *Id.* at 999-1000. it is not unconstitutionally vague. *Id.* at 1001-02.

Since Congress has the power to "incorporate by reference" state law, § 1955 does not violate the equal protection component of the due process clause even though it "applies only in states where gambling is illegal." *Id.* at 1003.

II. **Background: The Facts**

On the generally undisputed facts, appellants stand guilty under this section unless the words "violation of the law of a State" exempt them. In 1977 and 1978, appellants operated

significantly profitable casinos on Puyallup Indian reservation land within one mile of Tacoma and 25 miles of Seattle. The casinos, without any approval or license from the Washington State Gambling Commission, featured blackjack, poker and dice; their large net win was obtained at the expense of a clientele that included many non-Indians and some out-of-staters. Farris, Satiacum, Bertha Turnipseed and MacKenzie Turnipseed are Puyallup Indians; Baker, Powell, Lockwood, Painter and Ray Turnipseed are not.[1]

III. Issues

A. Applicability of § 1955 to Indians

The Puyallup appellants first claim that § 1955 does not apply to them at all. However, federal laws generally applicable throughtout the United States apply with equal force to Indians on reservations. For example, even as to Indians on reservations, federal jurisdiction extends "to crimes over which there is federal jurisdiction regardless of whether there is an Indian involved, such as assaulting a federal officer." *United States v. Wheeler,* 435 U.S. 313, 330 n.30 (1978); *accord, Walks on Top v. United States,* 372 F.2d 422 (9th Cir.) (assaulting a federal officer), *cert. denied,* 389 U.S. 879 (1967); *see United States v. Burns,* 529 F.2d 114 (9th Cir. 1976) (possession of firearm by a

[1]Powell is one-fourth Cherokee. Because only Puyallups are exempt from state regulation on the Puyallup reservation, however, we consider him a non-Indian for the purposes of this case.

felon); *Head v. Hunter,* 141 F.2d 449 (10th Cir. 1944) (forgery to defraud the United States).

There seem to be three exceptions to this rule, but appellants fall within none. First, reservation Indians may well have exclusive rights of self-governance in purely intramural matters, unless Congress has removed those rights through legislation explicitly directed at Indians. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55-56 (1978), *citing Roff v. Burney,* 168 U.S. 218 (1897) (tribal membership); *Jones v. Meehan,* 175 U.S. 1 (1899) (inheritance rules); and *United States v. Quiver,* 241 U.S. 602 (1916) (domestic relations). Or, to put it another way, "Indian tribes retain exclusive jurisdiction over essential matters of reservation government, in the absence of specific Congressional limitation." *Arizona ex rel. Merrill v. Turtle,* 413 F.2d 683, 684 (9th Cir. 1969), *cert. denied,* 396 U.S. 1003 (1970). But even a general federal law suffices to proscribe the large-scale professional gambling involved here; such gambling is neither profoundly intramural (the casinos' clientele was largely non-Indian) nor essential to self-government.

Second, it is presumed that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws, unless it makes specific reference to Indians. *Antoine v. Washington,* 420 U.S. 194 (1975); *Menominee Tribe v. United States,* 391 U.S. 404 (1968); *United States v. White,* 508 F.2d 453 (8th Cir. 1974). But this rule applies only to subjects specifically covered in treaties, such as hunting rights; usually, general federal laws apply to Indians. *E.g., Superintendent v. Commissioner,* 295 U.S. 418 (1935) (income tax). A different norm would only necessitate a huge quantity of statutory boilerplate.

To bring the special rule into play here, general treaty language such as that devoting land to a tribe's "exclusive use" is not sufficient (although such language does suffice to oust state jurisdiction); there would have to be specific language permitting gambling or "purporting to exempt Indians from the laws of general applicability throughout the United States regardless of situs of the act." *United States v. Burns,* 529 F.2d 114, 117 (9th Cir. 1976). Of course, there is no such specific language in the United States' treaty with the Puyallups, the Treaty of Medicine Creek, 10 Stat. 1132 (1854).

Finally, if appellants could prove by legislative history or some other means that Congress intended § 1955 not to apply to Indians on their reservations, we would give effect to that intent. But no evidence of such Congressional intent exists; indeed, "it defies reason to suppose that Congress intended" such an exemption, *see United States v. Montana,* 604 F.2d 1162, 1168 (9th Cir. 1979). Puyallup casinos in the Tacoma-Seattle area would flourish as mightily as those in such areas as Las Vegas and Atlantic City. Exempt from federal and state regulation, casinos on Indian land would defeat or endanger the federal interests of protecting interstate commerce and preventing the takeover of legitimate organizations by organized crime. We think the following passage from *United States v. Montana* bears repeating:

> We must recognize that in this case, as in others in which we are required to fix the rights and powers of Indians in the latter part of the twentieth century in the light of treaties of an earlier century, our task is to keep faith with the Indian while effectively acknowledging that Indians and non-Indians alike are members of one Nation. Both seek power and gain through identical

> processes, *viz.* commerce, politics, and litigation. We must, however, live together, a process not enhanced by unbending insistence on supposed legal rights which if found to exist may well yield tainted gains helpful to neither Indians nor non-Indians.

Id. at 1169. We find that Congress did not intend that Indians could freely engage in the large-scale gambling businesses that it forbade to all other citizens.

Therefore, we hold that § 1955 applies to appellants.

B. "Violation of the Law of a State"

1. *Puyallup Appellants*

The Puyallup appellants argue that even if § 1955 applies to them, they are not guilty of violating it. The casinos they operated on reservation land were not "in violation of the law of a State," they say, because the Washington state gambling laws do not extend past the reservation boundaries. We hold that appellants' premise is correct, but that their conclusion does not follow.

a. *State Jurisdiction Over Gambling*

The originally independent Indian nations, after conquest or acceptance of United States protection, came under federal control and the plenary power of Congress to remove every aspect of sovereignty from them. "But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by

implication as a necessary result of their dependent status." *United States v. Wheeler,* 435 U.S. 313, 323 (1978).

The treaty with the Puyallups is the Treaty of Medicine Creek, 10 Stat. 1132 (1854). Article II of the Treaty says that reservation land shall be "marked out for their exclusive use." Comparable language in other Indian treaties has been held to preserve Indian self-government as against state regulation. *E.g., Williams v. Lee,* 358 U.S. 217, 221-22 (1959).

Therefore, the traditional rule is that states have no criminal jurisdiction over offenses committed by Indians on Indian trust land. The rationale for this rule, however, has been changing: "[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 172 (1973); compare *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832). The Ninth Circuit takes the modern position. *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655, 658-59 (9th Cir. 1975), *cert. denied,* 429 U.S. 1038 (1977).

However, in 1953 Congress delegated to the states some of its power to regulate affairs on Indian reservations, by passing the Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 ("Public Law 280"). Section 2 of "Public Law 280," codified at 18 U.S.C. § 1162(a), immediately placed enumerated Indian lands under the full criminal jurisdiction of the states they were located in. (This section did not include the Puyallup land.) Section 7 of "Public Law 280" gave the necesary federal consent for states to take full criminal jurisdiction over all other Indian lands, if the state passed legislation to that effect. Under this section, Washington in

1963 enacted Wash. Rev. Code §37.12.010 and took jurisdiction over its Indians and Indian lands (including the Puyallups and their land). However, as to acts both committed by Indians and committed on Indian land, Washington took jurisdiction only over eight specific subject areas—chiefly welfare, family law and motor vehicles—but not gambling. Apart from this statute, the Washington courts do not have jurisdiction over crimes committed by Indians on Indian land, unless the tribe in question has requested the state to assume jurisdiction. *See Arquette v. Schneckloth,* 56 Wash. 2d 178, 351 P.2d 921 (1960). This partial assertion of jurisdiction was recently upheld in *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,* 439 U.S. 463 (1979).[2]

On the other hand, §37.12.010 asserted full criminal jurisdiction in *all* subject areas over offenses committed on Indian land *by non-Indians.* This state jurisdiction is "complete." 439 U.S. at 498. Indeed, it is fitting for a state to take such jurisdiction over non-Indians, for under no circumstances could such offenders be tried in tribal courts anyway. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978).

In sum, Washington may not enforce its gambling laws against the Puyallups on their reservation; however, it may enforce those laws against non-Indians, even on the Puyallup reservation.

---

[2]In 1968 Congress passed the Indian Civil Rights Act, retracting from the states some of this power to assert jurisdiction. Previous assertions were honored, but for a future assertion to be effective not only must the state enact legislation, but tribal consent must also be obtained. 25 U.S.C. §1321(a). The Puyallups have never given their consent to any state jurisdiction. Thus Wash. Rev. Code §37.12.010 would be invalid if it were passed for the first time today, but it is valid law because it was passed in 1963, during the reign of Section 7 of "Public Law 280."

b. *No Immunity From § 1955*

Given that Washington cannot enforce its gambling laws against the Puyallup appellants for their actions on Puyallup trust lands, nonetheless their actions were a "violation of the law of a State" for purposes of § 1955. The reason for that limitation was not to exempt from federal criminal liability those gambling-business operators who might be beyond the reach of a state's criminal jurisdiction, but rather to exempt from the federal statute the operators of gambling business that are not contrary to a state's public policy on gambling. Congress' intent was merely that § 1955 not apply indiscriminately to Nevada casino operators, Florida fronton operators, etc. Section 1955 as written "applies only in states where gambling is illegal." *United States v. Sacco,* 491 F.2d at 1003.

Washington public policy prohibits the type of gambling business conducted by appellants. *See* Wash. Rev. Code § § 9.46.010, 9.46.220. Therefore, for the purposes of the federal statute, their business was a "violation of the law of a State . . . in which it is conducted." The policy underlying § 1955 is that large-scale gambling is dangerous to federal interests wherever it occurs. The limitation of § 1955 to gambling that is a "violation of the law of a State or political subdivision in which it is conducted" does not reflect a Congressional judgment that gambling countenanced by state and local authorities does not harm federal interests; rather, it reflects Congress' judgment that the harm is outweighed by the interest of federalism that national legislation not trample the desires of particular states, which on the subject of gambling are expressed by the lack of prohibitory laws.

If the appellants' argument prevailed, the federal interests serves by § 1955 would be thwarted, without any benefit to the countervailing federalism interest. Casinos would operate in a major population center without any state or federal (or tribal) regulation. It would not be long before organized crime moved in on this golden opportunity. As the appellants ironically take pains to point out, one purpose of § 1955 was to prevent organized-crime infiltration of legitimate organizations. S. Rep. No. 617, 91st Cong., 1st Sess. 80 (1969). The federal law could thus be most appropriately applied here, for the casino operations placed the tribe in danger of mob takeover, whether it realized it or not. Moreover, the other major evil of large-scale gambling—harm to the national economy—arises regardless of whether a casino is on Indian or non-Indian land, especially when the clientele is not limited to Indians.

In this Circuit, "the immunity of Indian use of trust property from state regulation [is] based on the notion that trust lands are a Federal instrumentality held to effect the Federal policy of Indian advancement." *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655, 666 (9th Cir. 1975), *cert. denied,* 429 U.S. 1038 (1977). Under this view, it would be most inappropriate for immunity from state regulation to *defeat* the federal policies of opposition to large-scale gambling, protection of legitimate organizaitons from organized-crime infiltration, and promotion of the welfare of Indians. Therefore, we hold that § 1955 extends even to Indians on Indian lands who are immune from state law, and the convictions of Faris, Satiacum, Bertha Turnipseed and MacKenzie Turnipseed are affirmed.

2. *Non-Puyallup Appellants*

Since §1955 extends to Indian country, and the Washington gambling laws extend to non-Puyallups on Puyallup land, there is no doubt that the §1955 convictions of non-Puyallups Baker, Powell, Lockwood, Painter, and Ray Turnipseed must be affirmed.[3]

C. **Other Arguments**

The several other arguments that appellants raise lack merit.

1. *Preemption*

Appellants assert that 15 U.S.C. §1175, which specifically makes it "unlawful to . . . possess . . . any gambling device . . . within Indian country," should be construed to preempt the field of federal regulation of gambling on reservations and make §1955 inapplicable there. But the phrase "gambling device" in §1175 is limited in 15 U.S.C. §1171(a) to slot machines and other gambling machines and mechanical devices, which the casinos here were conspicuously cautious to avoid. Section 1955 covers all kinds of gambling, including the kinds involved in this case. Moreover, the comprehensive §1955 was passed 19 years after §1175. Therefore, we hold that §1175 does not

[3]Baker was also found guilty of violating 18 U.S.C. §1952 for his interstate travel in aid of his gambling business. We affirm this conviction for the same reasons we affirmed his §1955 conviction.

preempt all other federal regulation on gambling on reservatios, and the United States was free to proceed, in the exercise of prosecutorial discretion, under §1955. *See Hutcherson v. United States,* 345 F.2d 964, 967 (D.C. Cir.), *cert. denied,* 382 U.S. 894 (1965).

Nor are we convinced that §1955's harsher penalty proves that Congress meant only §1175 to apply to Indians. The federal interests challenged by a violation of §1955 (large-scale gambling subject to mob involvement) are more weighty than those affected by a violation of §1175 (possession of a gambling machine on an Indian reservation). Moreover, the harm to the federal interests protected by §1955 of a casino on Puyallup land would be as great as that flowing from a similar casino in San Francisco or Chicago.

2. *Exemption from State Law*

The Puyallup appellants argue that if the state gambling laws may be enforced against them through §1955, their treaty-based right to be free from the state criminal jurisdiction will be vitiated. But the Puyallups are subject to the plenary criminal jurisdiction of Congress, which can freely adopt state gambling laws expressly or by reference. Especially is this true where Congress acts not merely in aid of state law, but to secure independent federal interests, as it did by enacting §1955. Moreover, Washington state's gambling laws would be enforceable by the United States against Puyallups on their reservation even in the absence of §1955. The enclave laws of the United States are extended to Indian country by 18 U.S.C. §1152 (but not as to

"offenses committed by one Indian against the person or property of another Indian," *Id.*). One such enclave law is the Assimilative Crimes Act, 18 U.S.C. §13.[4] Therefore, we have held that Washington's prohibitory (but not regulatory) laws can be enforced by the federal government on the Puyallup reservation. *United States v. Marcyes,* 557 F.2d 1361, 1364 (9th Cir. 1977); *see United States v. Sosseur,* 181 F.2d 873 (7th Cir. 1950). Like the Washington law against the possession of dangerous fireworks, considered in *Marcyes,* the Washington law against professional gambling is prohibitory despite a number of "limited exceptions." *See* 557 F.2d at 1364; Wash. Rev. Code §9.46.220. Also, operating a casino with an non-Indian clientele is not an offense "committed by one Indian against the person or property of another Indian."

3. *Vagueness*

Appellants claim that §1955 is unconstitutionally vague as applied to Indians, relying on the well-recognized rule of construction that statutory ambiguities are to be resolved in favor of Indians. Their argument is that the state gambling regulations are so voluminous and detailed that an intelligent Indian could not understand them. We reject this

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[4]Whoever within [a federal enclave] is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. §13.

novel argument that detail creates vagueness. Moreover, these appellants were not tripped up by a detail, but flagrantly violated the core of the state law, albeit they were beyond the state's jurisdiction.

4. *Fundamental Fairness*

Appellants also raise due process (fundamental fairness) point against applying § 1955 to an Indian who in good faith believed that state gambling laws did not reach him on the reservation. But this prosecution is under the federal § 1955, which the Puyallup appellants apparently gave no thought to, and did violate. Any unfairness that they might feel subjected to here does not rise to the level of a due process/fundamental fairness violation, especially considering that their conduct was not exactly simon-pure.

5. *Tribal Regulation*

Although the Puyallup Tribe temporarily enacted a Gambling Code after the events involved in this case, no such tribal regulation was in effect at the time appellants' casinos were operating. Therefore we need not consider what effect such tribal regulation would have.

6. *Freedom From Organized-Crime Influence*

Some appellants argue that their casino was never polluted by organized crime. This does not, however, prevent conviction under § 1955. *United States v. Sacco,* 491 F.2d at 1000.

7. *Instructions as to Baker*

Baker contends that it was error to refuse his proffered instructions that state gambling laws do not apply to Indians on Indian land and that the Government must prove beyond a reasonable doubt that he knew his gambling operation violated state law.

Since Baker is not an Indian, the refusal of the first request was harmless, at worst. One the specific intent point, the court instructed that § 1952 requires "specific intent to facilitate an activity which the accused knew to the unlawful under state law." This captured the gist of Baker's request and may in any event have been a more favorable instruction than the law entitled him to.

IV. **Conclusion**

The convictions of all the appellants are AFFIRMED.

/s/ Herbert Y. C. Choy
United States Circuit Judge

UNITED STATES v. FARRIS et al.
Nos. 78-3517 et seq.

BROWNING, Circuit Judge, concurring in part, dissenting in part:

I concur in Judge Choy's opinion insofar as it affirms the

conviction of defendants who are not Puyallup Indians.

The indictments charged that the various defendants had engaged in "an illegal gambling business . . . involving the playing of blackjack, poker and dice in violation of the law of the State where the gambling business was conducted (R.C.W. 9.46)." The chapter of the Revised Code of Washington cited in the indictments provides for the licensing and regulation of gambling activities, and imposes criminal penalties for violation of the statute (R.C.W. 9.46.180), or of regulations adopted pursuant to the statute (R.C.W. 9.46.185).

It is conceded that the State could not prosecute the Puyallup appellants under the provisions of the Washington Code cited in the indictment. As Judge Choy points out, the State of Washington has elected not to exercise jurisdiction over gambling offenses committed by Indians on Indian lands unless the tribes request the State to do so, and the Puyallups have not. The decision not to assert jurisdiction expresses the State's general policy to exercise criminal jurisdiction over Indian reservations in a way that leaves "play for tribal self-government." *Washington v. Yakima Indian Nation,* 439 U.S. 463, 499 (1979).

Nevertheless, Judge Choy adopts the position that the actions of the Puyallups "were a 'violation of the law of a state' for purposes of §1955." This interpretation of the statute seems to me to be untenable. It exceeds the limits of reasonable construction to hold that conduct which could not be punished under the state law is nonetheless "a violation of the law of [the] State" within the meaning of 18 U.S.C. §1955. Conduct to which the law is inapplicable does not violate the law in the ordinary meaning of those

words. The idea that a person can transgress state law by conduct not punishable under that state law is inconsistent with minimum notions of notice and fairness.

Nothing in the legislative history of section 1955 supports the thesis that Congress intended to punish conduct that violated a state's policy on gambling even though it did not violate state law. The expressed purpose of Congress was to confer federal jurisdiction over the major forms of "illegal gambling" (*see, e.g.*, H.R. Rep. No. 1549, 91st Cong., 2nd Sess. 53 (1970); S.Rep. No. 617, 91st Cong., 1st Sess. 73 (1969)), and there is no reason to suppose that the term "illegal gambling" was used in any but its common sense of "in violation of the law."

The federal statute was intended to aid local law enforcement efforts. Congress did not intend to assert federal jurisdiction where state law allowed no local law enforcement effort at all. In the words of the Senate floor manager, the purpose of the federal statute was to "*add to* . . . local efforts the expertise, the manpower and the full resources of the Federal Bureau of Investigation, and other appropriate agencies of the Federal Government" (emphasis added). 116 Cong. Rec. 591 (1970) (remarks of Senator McClellan). Section 1955 was designed to improve "the established State-Federal law enforcement partnership"; solitary federal action was seen to be necessary "where local and State governments have been rendered powerless because of the corruption of the responsible officials." 116 Cong. Rec. 604 (1970) (remarks of Senator Allott). "This limited federal intervention should serve to reinforce the powers of the States and local governments in our federal system, rather than inject the Federal Government into a responsibility

traditionally left to the state." S. Rep. No. 617, 91st Cong., 1st Sess. 74 (1969).

Judge Choy's opinion justifies an expansive reading of section 1955 based on a supposed "policy underlying §1955 . . . that large-scale gambling is dangerous to federal interests wherever it occurs." The legislative history suggests no such policy. Congress was not concerned with gambling per se. The statute was addressed to what Congress perceived as a vicious circle of illegal gambling resulting in large profits which the criminal element then used to corrupt local officials—to purchase protection for illegal gambling and other unlawful activities, thus further expanding their illegal operations and increasing their profits. In the preamble to the portion of the Organized Crime Control Bill that later became 18 U.S.C. §1955, the Senate made the special finding that illegal gambling operations thwarted the enforcement of criminal laws by "the corruption and bribery of State and local officials." S. Rep. No. 617, 91st Cong., 1st Sess. 16 (1969). The same belief was expressed in the House. 116 Cong. Rec. 35295 (1970) (remarks of Congressman Poff). Federal intervention was thought necessary to make state and local laws effective "where local and state governments have become, in effect, incapable of law enforcement by reason of the corruption of responsible officials." S. Rep. No. 617 at 74. The prohibition of illegal gambling businesses was coupled with a prohibition of conspiracies to obstruct state law in furtherance of illegal gambling. *See* Organized Crime Control Act of 1970, Title VIII, Part B, 84 Stat. 922 (1970), *codified as* 18 U.S.C. §1511.

Conduct that violates state law only in the sense that it is

contrary to state policy, and that is subject neither to criminal penalties nor to civil sanctions imposed at the instance of law enforcement officials, would not pose the problems with which Congress was concerned. In the case at hand, for example, there was no need for the Puyallups to bribe state officials when there was no law under which the state could prosecute them.

Under the theory expressed in Judge Kennedy's concurrence, all those involved in a gambling business would be subject to federal prosecution if the involvement of any of them violated state law. The legislative history does not support so expansive a reading: there is nothing to suggest that Congress intended persons innocent under state law to answer under Section 1955 for the crimes of their associates.

Because no state or local law prohibited the actions of the Puyallup defendants, 18 U.S.C. § 1955 does not apply. The convictions of these defendants should be reversed.

Re: United States v. Farris, et al., Nos. 78-3517, etc.

KENNEDY, Circuit Judge, concurring:

I concur in the affirmance of the convictions of all the appellants. Although there are persuasive policy reasons, elaborated in Judge Choy's opinion, for applying section 1955 to the Puyallup appellants, I am more persuaded by a simple and literal reading of the statute. The statute makes it a violation of federal law to operate "an illegal gambling business." The federal statute focuses on whether the business itself is "a violation of the law of a State," and the

gambling operation in this case necessarily involved violation of state law, inasmuch as the non-Indian partners were subject to state prosecution by their operation of the business. This is sufficient to constitute the business itself, in its entirety, an "illegal gambling business" for the purposes of section 1955. That only some of the acts of the operators of the business were subject to state prosecution is to me immaterial to the question whether or not the business is an illegal gambling business for the purposes of federal law. The gambling casino in question was a single entity, an entity that was operated in violation of Washington law, and there was no separate, legally isolated portion of the gambling casino in which the Indians alone were involved.

If section 1955 were to read: "Whoever conducts, finances, manages, . . . *in violation of state law,* a gambling business shall be fined not more than $20,000 or imprisoned not more than five years," then we would be presented with the issue upon which Judge Browning bases his dissent. The italicized language is, however, not in the statute. In my view, the reading of the statute I propose is not only literally persuasive, but also rests on the common-sense proposition that a gambling enterprise that entails clear and unambiguous violations of state law by the non-Indian operators is certainly no less within either the policy or the plain language of section 1955 merely because it also entails acts by Indian operators that may or may not be violations of state law. It is a defendants's involvement in a business that a state prohibits, rather than his commission of particular individual acts that a state may prosecute, that constitutes the defendant's violation of section 1955. I would leave for another day the question addressed by Judges Browning and

Choy whether or not the federal statute would also prohibit a gambling business operated exclusively by Indians on a reservation.

Illegible

United States Circuit Judge

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Clerk, U.S. Court of Appeals]

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Clerk, U.S. Court of Appeals]

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AUG 14 1980
RICHARD H. DEANE
Clerk, U.S. Court of Appeals]

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HAROLD FARRIS, Defendant-Appellant.	)	No. 78-3517 DC CR 78-40-1
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JODY SATIACUM, Defendant-Appellant.	)	No. 78-3567 DC CR 78-52-1
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ALLEN DUDLEY POWELL, Defendant-Appellant.	)	No. 79-1013 DC CR 78-35
UNITED STATES OF AMERICA, Plaintiff-Appellee, v.	)	No. 79-1015 DC CR 78-40-3

LOUIS J. BAKER, Defendant-Appellant.	)	
UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 79-1313 DC CR 78-76T-1/2/3
RAY TURNIPSEED,BERTHA TURNIPSEED, and MACKENZIE TURNIPSEED, Defendants-Appellants.	)	
UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 79-1337 DC CR 78-76-4
DAVID PAINTER, Defendant-Appellant.	)	
UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 79-1338 DC CR 78-76-5 ORDER
MELVYN LOCKWOOD, Defendant-Appellant.	)	

Before: BROWNING, CHOY and KENNEDY, Circuit Judges,

The Opinion in this case is amended (1) by deleting the sentence on page 10, lines 26-28 ("Casinos would operate in a major population center without any state or federal (or tribal) regulation."); (2) by amending the succeeding

sentence to read, "It might not be long before organized crime invaded the Puyallup reservation."; (3) by deleting the first six words of the sentence on page 6, line 23 ("Exempt from federal and state regulation".)

The petitions for rehearing of Baker, Farris, Satiacum and Power are denied. We interpret the Turnipseeds' petition for rehearing en banc also to be a petition for rehearing; the petition for rehearing to the panel is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

* * * * *

§ 1922. False or withheld report concerning Federal employees' compensation

Whoever, being an officer or employee of the United States charged with the responsibility for making the reports of the immediate superior specified by section 8120 of title 5, willfully fails, neglects, or refuses to make any of the reports, or knowingly files a false report, or induces, compels, or directs an injured employee to forego filing of any claim for compensation or other benefits provided under subchapter I of chapter 81 of title 5 or any extension or application thereof, or willfully retains any notice, report, claim, or paper which is required to be filed under that subchapter or any extension or application thereof, or regulations prescribed thereunder, shall be fined not more than $500 or imprisoned not more than one year, or both.

(Added Pub.L. 89-554, § 3(d), Sept. 6, 1966, 80 Stat. 610.)

§ 1923. Fraudulent receipt of payments of missing persons

Whoever obtains or receives any money, check, or allotment under—

(1) subchapter VII of chapter 55 of title 5; or

(2) chapter 10 of title 37;

without being entitled thereto, with intent to defraud, shall be fined not more than $2,000 or imprisoned not more than one year , or both.

(Added Pub.L. 89-554, § 3(d), Sept. 6, 1966, 80 Stat. 610.)

CHAPTER 95—RACKETEERING

Sec.
1951. Inference with commerce by threats or violence.
1952. Interstate and foreign travel or transportation in aid of racketerring enterprises.
1953. Interstate transportation of wagering paraphernalia.
1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan.
1955. Prohibition of illegal gambling businesses.

§1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed

or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

(Added Pub.L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498 and amended Pub.L. 91-513, Title II, § 701(i)(2), Oct. 27, 1970, 84 Stat. 1282.)

§ 1953. Interstate transportation of wagering paraphernalia

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.

(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication, or (4) equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.
(Added Pub.L. 87-218, §1, Sept. 13, 1961, 75 Stat. 492, and amended Pub.L. 93-583, §3, Jan. 2, 1975, 88 Stat. 1916.)

§1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan

Whoever being—

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer of any of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan

receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of the actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned not more than three years, or both: *Provided,* That this section shall not prohibit the payment to

or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any employee welfare benefit plan or employee pension plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974, and (b) "employee organization" and "administrator" as defined respectively in sections 3(4) and (3)(16) of the Employee Retirement Income Security Act of 1974.
(Added Pub.L. 87-420, § 17(e), Mar. 20, 1962, 76 Stat. 42, and amended Pub.L. 91-452, Title II, § 225, Oct. 15, 1970, 84 Stat. 930; Pub.L. 93-406, Title I, § 111(a)(2)(C), Sept. 2, 1974, 88 Stat. 852.)

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business' means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizures, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs law; the diposition of such vesels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission of mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeitures of

vessels, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefits of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

(Added Pub.L. 91-452, Title VIII, § 803(a), Oct. 15, 1970, 84 Stat. 937.)

Preemption of State Laws. Enactment of this section as not indicating an intent on the part of the Congress to occupy the field in which section operates to the exclusion of State or local law on the same subject matter, or to relieve any person or any obligation imposed by any State or local law, see section 811 of Pub.L. 91-452, set out as a note under section 1511 of this title.

CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Sec.

1961. Definitions
1962. Prohibited racketerring activities.[1]
1963. Criminal penalties.
1964. Civil remedies.
1965. Venue and process.
1966. Expedition of actions.
1967. Evidence.
1968. Civil investigative demand.

§1961. Definitions

As used in this chapter—

(1) "racketeering activity" mans (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341

[1]Analysis does not conform to section catchline.

(relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illeal gambling businesses), section 2314 and 2315 (relating to interstate transportation of stolen property), section 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or * * *

* * * * *

[Ch. 24 GAMBLING DEVICES 15 § 1175]

* * * * *

so that the name and address of the shipper and of the consignee, and the nature of the article or the contents of the package may be readily ascertained on an inspection of the outside of the article or package.
Jan. 2, 1951, c. 1194, §4, 64 Stat. 1135.

Historical Note

Legislative History. For legislative history and purpose of Act Jan. 2, 1951, see 1950 U.S.Code Cong. Service, p. 4240.

Notes of Decisions

Evidence 3
Foreign commerce 2
Interstate commerce 1

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1. Interstate commerce

This section related only to interstate transportation. U.S. v. Ansani, D.C.Ill. 1955, 138 F.Supp. 451.

2. Foreign commerce

This section and section 1173 of this title are applicable to transportation of gambling devices in foreign commerce. U.S. v. 420 Gambling Devices, D.C.N.Y. 1961, 191 F.Supp. 111.

3. Evidence

Evidence did not sustain conviction for violation of this section. U.S. v. Ansani, D.C.Ill. 1955, 138 F.Supp. 451.

§1175. Specific jurisdictions within which manufacturing, repairing, selling, possessing, etc., prohibited

It shall be lawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of Title 18 or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of Title 18.
Jan.2, 1951, c. 1194, §5, 64 Stat. 1135.

Historical Note

Legislative History. For legislative history and purpose of Act Jan. 2, 1951, see 1950 U.S.Code Cong. Service, p. 4240.

Notes of Decisions

Indian country 1
Injunctions 3
Jurisdiction 2

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1. Indian country

Ordinance of Blackfeet Tribe which authorized gambling on the Indian reservation and the licensing of mechanical gambling devices was in conflict with this section prohibiting possession of gambling devices on an Indian reservation and was void. U.S. v. Blackfeet Tribe of Blackfeet Indian Reservation, D.C.Mont.1973, 364 F.Supp. 192.

Act of the Blackfeet tribal business council in legalizing

the possession of mechanical gambling devices on the Blackfeet reservation was in excess of its powers and the acts of the tribal court in restraining the removal of the seized devices and in citing the United States Attorney for contempt were in excess of its powers. Id.

[303]

* * * * *

RCW 9.46.160 **Conducting gambling activity without license as violation—Penalties.** Any person who conducts any activity for which a license is required by this chapter, or by rule of the commission, without the required license issued by the commission shall be guilty of a felony and upon conviction shall be punished by imprisonment for not more than five years or by a fine of not more than one hundred thousand dollars, or both. If any corporation conducts any activity for which a license is required by this chapter, or by rule of the commission, without the required license issued by the commission, it may be punished by forfeiture of its corporate charter, in addition to the other penalties set forth in this section.

RCW 9.46.170 **False or misleading entries or statements, refusal to produce records, as violation—Penalty.** Whoever, in any application for a license or in any book or record required to be maintained by the commission or in any report required to be submitted to the commission, shall make any false or misleading statement, or make any false or misleading entry or wilfully fail to maintain or make any entry required to be maintained or made, or who wilfully refuses to produce for inspection by the commission, or its

designee, any book, record, or document required to be maintained or made by federal or state law, shall be guilty of a cross misdemeanor and upon conviction shall be punished by imprisonment in the county jail for not more than one year or by a fine of not more than five thousand dollars, or both.

RCW 9.46.180 **Causing person to violate chapter as violation—Penalty.** Any person who knowingly causes, aids, abets, or conspires with another to cause any person to violate any provision of this chapter shall be guilty of a felony and upon conviction shall be punished by imprisonment for not more than five years or a fine of not more than one hundred thousand dollars, or both.

RCW 9.46.185 **Causing persons to violate rule or regulation as violation—Penalty.** Any person who knowingly causes, aids, abets, or conspires with another to cause any person to violate any rule or regulation adopted pursuant to this chapter shall be guilty of a gross misdemeanor and upon conviction shall be punished by imprisonment in the county jail for not more than one year or by a fine of not more than five thousand dollars, or both.

RCW 9.46.190 **Violations relating to fraud or deceit—Penalty.** Any person or association or organization operating any gambling activity who or which, directly or indirectly, shall in the course of such operation:

(1) Employ any device, scheme, or artifice to defraud; or

(2) Make any untrue statement of a material fact, or omit to state a material fact necessary in order to make the statement made not misleading, in the light of the circumstances under which said statement is made; or

(3) Engage in any act, practice or course of operation as

would operate as a fraud or deceit upon any person;

Shall be guilty of a gross misdemeanor and upon conviction shall be punished by imprisonment in the county jail for not more than one year or by a fine of not more than five thousand dollars, or both.

RCW 9.46.195 **Obstruction of public servant in administration or enforcement as violation—Penalty.** No person shall intentionally obstruct or attempt to obstruct a public servant in the administration or enforcement of this chapter by using or threatening to use physical force or by means of any unlawful act. Any person who violates this section shall be guilty of a misdemeanor.

RCW 9.46.196 **Defrauding or cheating other participant or operator as violation—Causing another to do so as violation—Penalty.** No person participating in a gambling activity shall in the course of such participation, directly or indirectly:

(1) Employ or attempt to employ any device, scheme, or artifice to defraud any other participant or any operator;

(2) Engage in any act, practice, or course of operation as would operate as a fraud or deceit upon any other participant or any operator;

(3) Engage in any act, practice, or course of operation while participating in a gambling activity with the intent of cheating any other participant or the operator to gain an advantage in the game over the other participant or operator; or

(4) Cause, aid, abet, or conspire with another person to cause any other person to violate subsections (1) through (3) of this section.

Any person violating this section shall be guilty of a gross

misdemeanor and upon conviction shall be punished by imprisonment in the county jail for not more than one year or by a fine of not more than five thousand dollars, or both.

RCW 9.46.198 **Working in gambling activity without license as violation—Penalty.** Any person who works as an employee or agent or in a similar capacity for another person in connection with the operation of an activity for which a license is required under this chapter or by commisison rule without having obtained the applicable license required by the commission under RCW 9.46.070(16) shall be guilty of a gross misdemeanor and shall, upon conviction, be punished by not more than one year in the county jail or a fine of not more than five thousand dollars, or both.

RCW 9.46.220 **Professional gambling as violation—Penalty.** Whoever engages in professional gambling, or knowingly causes, aids, abets, or conspires with another to engage in professional gambling, shall be guilty of a felony and fined not more than one hundred thousand dollars or imprisoned not more than five years or both: PROVIDED, HOWEVER, that this section shall not apply to those activities enumerated in RCW 9.46.030 or to any act or acts in furtherance thereof when conducted in compliance with the provisions of this chapter and in accordance with the rules and regulations adopted pursuant thereto.

RCW 9.46.230 (4) and (5) **Seizure and disposition of gambling devices—Owning, buying, selling, etc., gambling devices or records—Penalties.**

(4) Whoever knowingly owns, manufactures, possesses, buys, sells, rents, leases, finances, holds a security interest in, stores, repairs, or transports any gambling device as

defined in RCW 9.46.020 as now or hereafter amended or offers or solicits any interest therein, whether through an agent or employee or otherwise, shall be guilty of a felony and fined not more than one hundred thousand dollars or imprisoned not more than five years or both; PROVIDED, HOWEVER, that this subsection shall not apply to devices used in those activities enumerated in RCW 9.46.030, as now or hereafter amended, when the devices are of the type and kind traditionally and usually employed in connection with the particular activity. Nor shall this subsection apply to any act or acts in furtherance of such activities when conducted in compliance with the provisions of this chapter and in accordance with the rules and regulations adopted pursuant thereto. Subsection (2) of this section shall have no application in the enforcement of this subsection. In the enforcement of this subsection direct possession of any such gambling device shall be presumed to be knowing possession thereof.

(5) Whoever knowingly prints, makes, possesses, stores, or transports any gambling record, or buys, sells, offers, or solicits any interest therein, whether through an agent or employee or otherwise, shall be guilty of a gross misdemeanor; PROVIDED, HOWEVER, that this subsection shall not apply to records relating to and kept for activities enumerated in RCW 9.46.030, as now or hereafter amended, when the records are of the type and kind traditionally and usually employed in connection with the particular activity. Nor shall this subsection apply to any act or acts in furtherance of such activities when conducted in compliance with the provisions of this chapter and in accordance with the rules and regulations adopted pursuant thereto. In the enforcement of this subsection direct possession of any such gambling record shall be presumed to be knowing possession thereof.

RCW 9.46.010 (10) **Definitions.**

(10) "Gambling device" means: (a) Any device or mechanism the operation of which a right to money, credits, deposits or other things of value may be created, in return for a consideration, as the result of the operation of an element of chance; (b) any device or mechanism which, when operated for a consideration, does not return the same value or thing of value for the same consideration upon each operation thereof; (c) any device, mechanism, furniture, fixture, construction or installation designed primarily for use in connection with professional gambling; and (d) any sub-assembly or essential part designed or intended for use in connection with any such device, mechanism, furniture, fixture, construction or installation. But in the application of this definition, a pinball machine or similar mechanical amusement device which confers only an immediate and unrecorded right of replay on players thereof, which does not contain any mechanism which varies the chance of winning free games or the number of free games which may be won or a mechanism or a chute for dispensing coins or a facsimile thereof, and which prohibits multiple winnings depending upon the number of coins inserted and requires the playing of five balls individually upon the insertion of a nickel or dime, as the case may be, to complete any one operation thereof, shall not be deemed a gambling device: PROVIDED FURTHER, that owning, possessing, buying, selling, renting, leasing, financing, holding a security interest in, storing, repairing and transporting such pinball machines or similar mechanical amusement devices shall not be deemed engaging in professional gambling for the purposes of this chapter and shall not be a violation of this chapter: PROVIDED FURTHER, that any fee for the purchase or rental of any such pinball machines or similar amusement devices

shall have no relation to the use to which such machines are put but be based only upon the market value of any such machine, regardless of the location of or type of premises where used, and any fee for the storing, repairing and transporting thereof shall have no relation to the use to which such machines are put, but be commensurate with the cost of labor and other expenses incurred in any such storing, repairing and transporting.

RCW 9.46.240 **Gambling information, transmitting or receiving as violation—Penalty.** Whoever knowingly transmits or receives gambling information by telephone, telegraph, radio, semaphore or similar means, or knowingly installs or maintains equipment for the transmission or receipt of gambling information shall be guilty of a gross misdemeanor: PROVIDED, HOWEVER, that this section shall not apply to such information transmitted or received or equipment installed or maintained relating to activities as enumerated in RCW 9.46.030 or to any act or acts in furtherance thereof when conducted in compliance with the provisions of this chapter and in accordance with the rules and regulations adopted pursuant thereto.

Nos. 80-603, 80-677 and 80-678

In the Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS J. BAKER, PETITIONER

v.

UNITED STATES OF AMERICA

RAY TURNIPSEED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

HAROLD FARRIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether petitioners were properly convicted under federal law for participating in gambling businesses located on Indian land.

2. Whether petitioners' convictions violated the Due Process Clause (Nos. 80-677 and 80-678).

3. Whether the district court properly instructed the jury on the reach of the state gambling laws and on the requisite intent to sustain a conviction (No. 80-603).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Sanabria v. *United States*, 437 U.S. 54	6
United States v. *Hawes*, 529 F.2d 472	7, 8
United States v. *Marcyes*, 557 F.2d 1361	6
Washington v. *Yakima Indian Nation*, 439 U.S. 463	4

Statutes:

Act of Aug. 15, 1953 (Pub. L. No. 280), ch. 505, 67 Stat. 588-590	4
18 U.S.C. 1952	1, 5
18 U.S.C. 1955	1, 5, 7
18 U.S.C. 1955(a)	5
1963 Wash. Laws ch. 36	4
Wash. Rev. Code:	
§ 9.46.198 (Cum. Supp. 1980)	6
§ 9.46.220 (1977)	6
§ 37.12.010 (1964)	4

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a)[1] is reported at 624 F.2d 890.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1980. Petitions for rehearing were denied on August 14, 1980 (Pet. App. 1b-3b). The petition for a writ of certiorari in No. 80-603 was filed on October 10, 1980. The petitions for a writ of certiorari in Nos. 80-677 and 80-678 were filed on October 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioner Baker was convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955, and of interstate travel to promote that unlawful activity, in violation of 18 U.S.C. 1952. He was sentenced to concurrent terms of six months' imprisonment and fined a total of $20,000. Following bench trials on stipulated facts, the eight other petitioners also were convicted of conducting an illegal gambling business.[2] Petitioners Farris, Powell, Ray Turnip-

[1] Except where otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 80-603.

[2] Petitioners Farris and Powell were tried individually. Petitioner Satiacum was tried with two co-defendants, who did not appeal their convictions. The other five petitioners were tried together.

seed, Bertha Turnipseed and Mackenzie Turnipseed were sentenced to two months' imprisonment and fined $10,000. Petitioners Lockwood and Painter were sentenced to two years' probation and fined $3,000. The court of appeals affirmed the convictions (Pet. App. 1a-23a).[3]

Petitioners Farris, Satiacum, Bertha Turnipseed and Mackenzie Turnipseed are Puyallup Indians. Petitioners Baker, Powell, Painter, Lockwood and Ray Turnipseed are not. In 1977 and 1978, without any approval or license from the Washington State Gambling Commission, each petitioner was involved in the operation of one of three gambling casinos, the Indian House Casino, the American Indian Casino and BJ's Social Club Casino, on the Puyallup Indian Reservation near Tacoma and Seattle, Washington. These casinos featured blackjack, poker and dice, and had a clientele that included many non-Indians and out-of-staters (Pet. App. 4a-5a). The casinos were closed on April 24, 1978, following a raid by the FBI.

The Indian House Casino, which was owned by Farris, Powell and another non-Indian, opened in August 1977. Petitioner Baker began working at the casino in November 1977 and became the casino manager about six months later. The casino operated 24 hours a day with 30 to 80 employees, including floormen, pit bosses, and dealers. In early 1978, petitioners Farris and Baker traveled to Las Vegas, where they acquired some gambling paraphernalia, which they brought back with them to Washington. In January and March 1978, the Indian House had a

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[3] Judge Browning dissented from the affirmance of the convictions of petitioners Farris, Satiacum, Bertha Turnipseed and Mackenzie Turnipseed on the ground that they are Puyallup Indians (Pet. App. 17a-21a).

net monthly profit of over $60,000 (Stipulation of Facts and Agreement filed in the district court in No. CR78-40T).

Petitioner Satiacum owned and operated the American Indian Casino, which opened in March 1978 and also featured around-the-clock blackjack and high-stakes poker. When this casino was shut down the following month, its bank account revealed deposits in excess of $216,000 (Stipulation of Facts, No. CR78-52T).[4]

BJ's Social Club Casino opened in December 1976. Petitioner Bertha Turnipseed, the nominal owner of the casino, and her husband, petitioner Ray Turnipseed, were principally responsible for financing the casino's operations and purchasing the necessary gambling supplies and equipment. Their son, petitioner Mackenzie Turnipseed, supervised the casino's day-to-day operations and also helped manage its financial affairs. Petitioners Painter and Lockwood worked as pit bosses, supervising the casino's employees and overseeing the gambling activities, which went on twenty-four hours a day. Painter was also responsible for recruiting blackjack dealers.

When the casino first opened, it featured various kinds of poker games that were legal under Washington state law. After about six months, however, the casino switched to a form of poker that was unlawful under state law but more profitable for the "house." In late 1977, after poker profits had declined due to competition from nearby casinos, petitioners decided to limit BJ's gambling operations to

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[4] Petitioner Satiacum's two co-defendants, who were not Indians, worked in the casino overseeing the gambling activities.

blackjack. Accordingly, in January 1978, blackjack dealers were trained on the casino's premises and ten custom-made blackjack tables were installed.

During this casino's operations in 1978, approximately fifteen blackjack dealers, a "pit boss", a cashier, and a number of "kitchen girls" worked on each eight-hour shift. From 2:00 a.m. to 5:00 a.m., all ten of the casino's blackjack tables, each of which could accommodate ten players, were typically in operation. Each blackjack table could handle between approximately $300 and $400 an hour in wagers. On three different days in April 1978, a total of six undercover FBI agents played blackjack at BJ's. Stipulation of Facts and Agreement, No. CR78-76T.

ARGUMENT

1. Petitioners contend that their convictions were invalid because the gambling businesses that they conducted on Puyallup trust land were not prohibited by Washington state law. This contention was properly rejected by the court below. There being no conflict among the circuits, further review by this Court is not warranted.

The criminal jurisdiction of the State of Washington over Indians on Indian territory within the State is considered in detail in *Washington* v. *Yakima Indian Nation*, 439 U.S. 463 (1979). That decision sustained, as authorized by Pub. L. No. 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-590), 1963 Wash. Laws ch. 36 (Wash. Rev. Code § 37.12.010 (1964)), which unilaterally assumed complete criminal jurisdiction for offenses committed by non-Indians on Indian lands within State boundaries but exempted—except for matters not here relevant—Indians on trust lands. It is thus clear that Washing-

ton's gambling laws apply to non-Indian activities on the Puyallup trust lands involved here. On the other hand, it is equally plain that the Puyallup petitioners could not be prosecuted under State gambling laws for their gambling activities there. In this context, the question presented is whether the casino operations, involving both members of the Tribe and outsiders, constitute "illegal gambling business[es]" under Section 1955 and "unlawful activit[ies]" under Section 1952.

In our view, the answer is not in doubt. There is no occasion here to decide whether or not the federal statutes underlying these prosecutions would apply to a wholly tribal gambling operation on trust land, catering only to members. For present purposes, it is enough to notice that the casino operations involved non-Indians and therefore violated State law. As Judge Kennedy's concurring opinion states (Pet. App. 21a-22a), "[t]he federal statute focuses on whether the business itself is 'a violation of the law of the State' " and each casino, viewed as "a single entity," plainly transgressed Washington's gaming prohibition.

It follows that all those who significantly participated in the illegal businesses were properly charged. The non-Indian petitioners, having directly violated State law, were plainly subject to the federal prosecution. Nor are the Indian petitioners exempt. It is not disputed that each of these "conduct[ed], finance[d], manage[d], supervise[d], direct[ed], or own[ed] all or part of [those] illegal gambling business[es]" (18 U.S.C. 1955(a)). Their immunity from State prosecution is therefore irrelevant. As this Court has observed, to sustain a conviction under Section 1955, "[t]he Government need not prove that

the defendant himself performed any act of gambling prohibited by state law. It is participation in the gambling business that is a federal offense, and it is only the gambling business that must violate state law." *Sinabria* v. *United States*, 437 U.S. 54, 70 (1978).

The related claim (80-677 Pet. 19-29) that Washington state law merely regulates, rather than prohibits, gambling is insubstantial. As the court of appeals correctly observed (Pet. App. 15a), "the Washington law against professional gambling is prohibitory despite a number of 'limited exceptions.'" See Wash. Rev. Code §§ 9.46.220, 9.46.198 (1977 & Cum. Supp. 1980);[5] cf. *United States* v. *Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1977).

2. Petitioners' claim (80-677 Pet. 13-19; 80-678 Pet. 15-19) that their convictions violated the Due

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[5] Wash. Rev. Code § 9.46.220 (1977) provides in relevant part:

> **Professional gambling as violation—Penalty.** Whoever engages in professional gambling, or knowingly causes, aids, abets, or conspires with another to engage in professional gambling, shall be guilty of a felony and fined not more than one hundred thousand dollars or imprisoned not more than five years or both * * *.

Wash. Rev. Code § 9.46.198 (Cum. Supp. 1980) provides:

> **Working in gambling activity without license as violation—Penalty.** Any person who works as an employee or agent or in a similar capacity for another person in connection with the operation of an activity for which a license is required under this chapter or by commission rule without having obtained the applicable license required by the commission under RCW 9.46.070(16) shall be guilty of a gross misdemeanor and shall, upon conviction, be punished by not more than one year in the county jail or a fine of not more than five thousand dollars, or both.

Process Clause on the grounds that they did not intend to violate state law and did not have fair notice that their conduct violated 18 U.S.C. 1955 is baseless. Intent to violate state law is not a necessary element of Section 1955. *United States* v. *Hawes*, 529 F.2d 472, 481 (5th Cir. 1976). Clearly, with respect to its application to the non-Indian petitioners, 18 U.S.C. 1955 is not vague, since they directly violated state law. Moreover, all of the petitioners were put on notice that their conduct fell within the ambit of Section 1955 by a 1976 ruling of the district court in a case against petitioner Satiacum's father that professional gambling operations on the Puyallup reservation violated the federal statute (see Stipulation of Facts, CR78-52T at 41).[6]

3. Finally, petitioner Baker contends (80-603 Pet. 8-9) that the district court erred in refusing to instruct the jury that the state gambling laws do not apply to Indians on Indian land, and that the government had to prove that he knew that his gambling activities violated state law. As the court of appeals observed (Pet. App. 17a), the applicability of state gambling law to the activities of Indians on Indian land is irrelevant to petitioner Baker's convictions, since he is not an Indian. Further, the district court did instruct the jury that Section 1955 requires "specific intent to facilitate an activity which the accused

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[6] The prior criminal action was dismissed when the defendants in that case consented to the entry against them in a civil action of the injunction reproduced at 80-677 Pet. App. A-3-1 to A-3-3 (Stipulation of Facts, CR78-52T at 41-42; Stipulation of Facts and Agreement, CR78-76T at 7-8). Contrary to petitioners' contention (80-677 Pet. 14-16), the injunction clarified, rather than "confused," the issue, by making clear that gambling on Indian land could violate federal law. See 80-677 Pet. App. A-3-2.

knew to be unlawful under state law" (Pet. App. 17a), which was a more favorable instruction than that to which the law entitled petitioner. See *United States* v. *Hawes, supra,* 529 F.2d at 481.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1980

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